RECENT AMERICAN DECISIONS.

Circuit Court, S. D. New York.

OLD DOMINION STEAMSHIP CO. *v.* McKENNA ET AL.

The procurement of workmen, who are employed upon terms as to wages which are just and satisfactory to quit work in a body for the purpose of inflicting injury and damage upon the employer by persons who are not in his employ, and until the employer should accede to demands of such outside persons, which he is under no obligation to grant, constitutes in law a malicious and illegal interference with the employer's business, which is actionable.

Declaring and attempting to enforce a boycott for the purpose of compelling an employer to pay such a rate of wages to his employees as the boycotters who are not in his employ might demand, are acts rendering the boycotters liable in damages, and are also misdemeanors at common law as well as by Pen. Code N. Y. § 168.

All combinations and associations designed to coerce workmen to become members of such combinations or associations, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskilful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable.

An action to recover damages from those who have combined to do such an injury to a plaintiff's business, and the use of his property, is "an action for an injury to property," within the meaning of section 549, subd. 2, Code Civil Proc. N. Y., and an order for the arrest of defendants may be granted therein.

MOTION to Discharge from Arrest.

Clarence A. Seward, for plaintiffs.

Louis F. Post and *Samuel Ashton*, for defendants.

BROWN, J.—This action was brought to recover $20,000 damages alleged to have been sustained by the plaintiff through the unlawful action of the defendants, in the recent strike of the 'longshore-men, and in their attempt to boycott the plaintiff in its business as a common carrier. The defendants are alleged to constitute or to style themselves, an "Executive Board of the Ocean Association of the 'Longshore-men's Union." At the time of the commencement of the action they were arrested and held to bail under orders of arrest issued in conformity with the state practice. The defendants now move, upon the plaintiff's papers only, to vacate the order of arrest, on the ground that the material facts charged

are alleged on information and belief only, without a sufficient statement of the sources of information; that the facts stated do not make out a *prima facie* case; that it appears that the defendants were acting within their legal rights; and that the plaintiff's loss, if any, is *damnum absque injuria;* and that, at best, the plaintiff's case is so doubtful, that the order of arrest should not be sustained.

I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time, I can only state my conclusions:

1. All the material averments are either stated positively, or the source of information is sufficiently indicated.

2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants, for the actual damages suffered, for the following reasons:

(*a*) The plaintiff was engaged in the legal calling of a common carrier, owning vessels, lighters and other craft used in its business, in the employment of which numerous workmen were necessary, who, as the complaint avers, were employed "upon terms as to wages which were just and satisfactory."

(*b*) The defendants, not being in plaintiff's employ, and without any legal justification, so far as appears—a mere dispute about wages, the merits of which are not stated, not being any legal justification—procured plaintiff's workmen in this city and in southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendant's demands, and pay southern negroes the same wages as New York longshore-men, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

(*c*) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business, and attempted to prevent the plaintiff from carrying on any business as common carriers, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all dealings of other persons with the plaintiff, by sending threatening notices

or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it, through threats of loss and expense in case they dealt with the plaintiff by receiving, storing or transmitting its goods, or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts, and withheld their former customary business, greatly to the plaintiff's damage.

(*d*) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law, as well as by section 168 of the Penal Code of this state.

(*e*) Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights,—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable. See Greenh. Pub. Pol. 648, 653; *People* v. *Fisher*, 14 Wend. 1; *Tarleton* v. *McGawley*, Peake, *205; *Rafael* v. *Verelst*, 2 W. Bl. 1055; *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, 6 Q. B. Div. 333, 337; *Gregory* v. *Duke of Brunswick*, 6 Man. & G. 205; *Gunter* v. *Astor*, 4 J. B. Moore 12; *Reg.* v *Rowlands*, 17 Adol. & E. (N. S.) 671, 685; *Mogul St. Co.* v. *McGregor*, 15 Q. B. Div. 476; *Walker* v. *Cronin*, 107 Mass. 555; *Carew* v. *Rutherford*, 106 Id. 1; *State* v. *Donaldson*, 32 N. J. Law 151; *Master Stevedores' Ass'n.* v. *Walsh*, 2 Daly 1, 13; *Johnston Co.* v. *Meinhardt*, 60 How. Pr. 168; *Slaughter-house Cases*, 16 Wall. 36, 116.

3. There is no such doubt concerning the plaintiff's legal rights

as should debar it from the usual remedy. The motion to discharge from arrest is therefore denied.

Among the practical legal questions which the recent discussion of social problems has brought forward, none have assumed greater prominence than the discussion as to how far labor and trade combinations are in violation of the common law of conspiracy. Generally speaking, the American people have a peculiar genius for combinations. Many enterprises that in other countries are controlled by government, in our country, are carried out by voluntary combinations. DeTocqueville has pointed out the infinite diversity of these associations; and he ascribes to them an important influence in upholding our institutions. But combinations of this character are not altogether beneficial; and there seems to be a growing opinion of late that these combinations have in some instances, stepped beyond the bounds of legitimate action. When we behold the vicious methods often resorted to by associated corporations and individuals in controlling markets, or the tyranny of labor combinations, every one must admit that, at least in some of their phases, these combinations assume the character of unlawful conspiracies. It is a maxim of the law that there is no wrong without a remedy; and there is no exception in the case of wrongs inflicted by combinations of this character. Recent and direct adjudications, however, are few, and it will be necessary to consider many old English decisions and statutes and so to trace the development of this branch of the law in this country. And although it is possible to collect many general principles which run through the cases, yet there are many doubtful points still unsettled. It is almost impossible to lay down general rules which will always govern, and the only way in which the rules of law which apply to this subject can be understood, is by referring to the particular cases where they have been expounded and applied. And in order to bring out clearly the opinions of the various jurists who have discussed this subject, we will often find it necessary to cite the exact words which they use.

A conspiracy is a confederacy of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means. 2 Bish. Cr. Law (7th ed.) 175; *Com.* v. *Hunt*, 4 Met. 111; *Lambert* v. *People*, 9 Cow. 601; *Com.* v. *Judd*, 2 Mass. 329; Whart. Cr. Law (9th ed.) 1337; *People* v. *Fisher*, 14 Wend. 9. But in applying this definition to trade and labor, as well as other combinations, it becomes an important question as to what is the meaning to be given to the word "unlawful." Unlawful in this connection does not necessarily mean indictable as an offence. The additional power and dangerous character of a conspiracy often render a combination to do an act, criminal; when, if the act were done singly indictability would not attach.

Trade and labor combinations manifest themselves under different forms. There may be combinations merely to agree on certain terms in dealing with others. Again, combinations may be formed to carry out their demands by means of violence. And still other combinations may not contemplate violence, but may be formed for the purpose of prejudicing, coercing or defrauding individuals or the public. This is not intended as a scientific division of the subject. Other forms of trade and labor combinations might manifest themselves. And often combinations may have the characteristics of more than one of these kinds. But it will be convenient to discuss the subject under these headings; and this will enable us to bring out as clearly as possible, which combinations are considered legal, and which illegal.

Combinations where a Number of Labor-

ers or Business Men merely agree on certain terms which they will all ask in dealing with others.—An example of such a combination is where a number of workingmen meet and agree upon a price which they will ask for their labor and then say to their employer that they will not work for him except at the price fixed upon. It will be observed that such a combination is one of the mildest character. There is no intention to use violence, nor is it sought to dictate to the employer methods of conducting his business in regard to matters with which the workmen are not concerned. In England, there seems to be good reason to believe that even such a combination as this was an indictable conspiracy at common law. In early times this subject was regulated by statute. And all combinations to agree on terms to be asked for work were statutory conspiracies. But, independently of the statutes, there seems to have been an opinion that such combinations were indictable at common law.

The case of *Rex* v. *Journeymen Tailors of Cambridge*, 8 Mod. 10, decided in 1721, is usually cited in this connection. This case grew out of an indictment for conspiracy to raise wages, and it was held on motion in arrest of judgment, that the indictment need not conclude *contra formam statuti*, because it was for a conspiracy which was an offence at common law. It should be remarked, however, that this case is of little authority, the book it is published in, 8 Mod. Rep. being notoriously full of mistakes. For instance, Justice WILMOT, said of it that nine cases out of ten in that book are totally mistaken: *King* v. *Harris*, 7 Term Rep. 239.

In *Rex* v. *Mawbey*, 6 Term Rep. 619, there is a dictum of GROSS, J., who says: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, although the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for conspiracy."

And in *King* v. *Eccles*, 1 Leach 274, Lord MANSFIELD places combinations to raise prices on the same footing as those to raise wages. As to combinations to raise prices of commodities at that time, see also, *Rex* v. *Norris*, 2 Ken. 300. He says: "Persons in possession of any articles of trade may sell them at such price as they individually may please, but if they confederate and agree not to sell under certain prices it is conspiracy. So every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence."

Although some of these decisions are of little authority yet there is good reason to believe that in England all combinations to raise the prices of wages or of commodities were criminal at common law. This seems to have been the general opinion in 1825 as far as labor combinations were concerned. And in that year parliament passed an act expressly authorizing labor combinations where workmen simply act in concert in demanding particular wages, hours of work, &c.

It would seem, however, that in some cases the courts, previous to the statute of 1825, held such combinations illegal because wages at that time were fixed by statute. And the very act of seeking to get higher than statutory wages was unlawful. Hence a combination to demand higher wages was a conspiracy to commit an offence, and hence, of course, illegal. This may serve to explain why a mere combination to agree on terms to be asked for work is not illegal in this country. In regard to this point SHAW, C. J., has said: "Although the common law in regard to

conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this state. The general rule of the common law is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law, or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship—not being adapted to the circumstances of our colonial condition—were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases would not be a precedent for a like conviction here. *The King* v. *Journeymen Tailors of Cambridge*, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction of journeymen mechanics of a conspiracy to raise their wages. It was there held, that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. At the same time it was conceded, that the unlawful object to be accomplished was the raising of wages above the rate fixed by a general act of parliament. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful if not criminal." *Com.* v. *Hunt*, 4 Met. 121. See, also, *Com.* v. *Carlisle*, Bright. 37. Hence, in this country it seems to be well settled law that a combination of laborers merely to agree on what terms they are to work is not criminal. 2 Bish. Cr. Law 233; *Master Stevedores' Ass'n* v. *Walsh*, 2 Daly 5; *State* v. *Donaldson*, 3 Vroom 151; *Johnson* v. *Meinhart*, 60 How. Pr. Rep. 171. But see, *People* v. *Fisher*, 14 Wend. 9. Something more must be alleged and proved than a mere combination. Any other doctrine would be entirely inconsistent with the spirit of our institutions. The great employer who is perhaps a business firm or corporation in in which is concentrated the capital of many persons would have a great advantage over its employees if each of them were required to treat with it separately. It is said that in union there is strength. If capital has a right to combine, labor also has a right to combine; and both labor and capital are held to the same rules in determining the lawfulness of the combination.

Combinations where the Purposes of the Organization are sought to be accomplished by Violence.—About this form of conspiracy there need be little said. To assault a man is criminal; and to conspire to conduct a strike or boycott by a systematic resort to assault and battery, is a conspiracy to accomplish a purpose by unlawful means, thus bringing it within the definition given above: *Master Stevedores' Association* v. *Walsh*, 2 Daly 10; *Johnson* v. *Meinhart*, 60 How. Pr. Rep. 168;

Commonwealth v. *Hunt*, 4 Met. 111. It is very necessary, however, that this form of trade and labor conspiracies be carefully distinguished from the other forms. And the language of the decisions should be carefully scrutinized in order to ascertain whether the unlawfulness of the combination is placed upon this ground or upon other grounds.

Combinations where Violence is not contemplated, but which are formed for the purpose of Prjeudicing, Coercing or Defrauding Individuals or the Public.—An example of such a conspiracy is where a number of workmen say to an employer, "Discharge A. B. or we will leave you—buy in this market or that market; conform to this rule or that rule, or we will not continue in your employ." This brings up a very delicate question: It may be said, "Has not a man a right to work for whom he pleases? Has he not a right to refuse to work for any reason which may suit his fancy?" To this the law must answer: "Yes." Generally speaking, every man has a right to work for whom he pleases and to manage his own affairs. But where a combination of men, not content with managing their own business, seek to manage the affairs of others; where, by concerted means and with an evil intent, they seek to deprive another of *his* right to manage *his* business, then the law steps in and protects the man whose rights are infringed. The weight of authority seems to be that while, generally speaking, the right to form business relations at will is not to be questioned, yet that right must not be exercised to prejudice or coerce others. This point has been often questioned, and it will be necessary to review the principal English and American authorities in order to gather a general rule upon this subject and to distinguish as far as possible the seemingly inconsistent cases.

In England the subject of wages has, from an early date, been regulated by statute. But the statute of 6 Geo. IV., c. 129, enacted in 1825, repealed all these early statutes and enacted that combinations of laborers merely to agree on what terms they should work would not be unlawful. And it has been held in England, that while the statute allowed combination of workingmen to agree on what terms they should work, yet a combination formed for the purpose of coercing an employer in regard to managing his business was not touched by the statute and hence was indictable. For instance, in *King* v. *Bykerdike*, 1 M. & Rob. 179, the question came up as to whether it was lawful for workmen to conspire to coerce the employer to discharge certain men, by threatening to leave in a body. And PATTESON, J., told the jury that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal. Questions of a similar nature to this have come up for adjudication a number of times in England since the Statute of 6 Geo. IV. In many cases it has been held that such acts were conspiracies to violate another provision of the statute which prohibited interfering with another in regard to his business or labor by threats, molestation, intimidation, and obstruction. Yet it has been often said that this form of conspiracy would be criminal at common law, independently of this latter provision of the statute: *Walsby* v. *Anley*, 3 E. & E. 516; *Reg.* v. *Hewitt*, 5 Cox C. C. 162; *Reg.* v. *Duffield*, Id. 404; *Reg.* v. *Druitt*, 10 Id. 493; *Reg.* v. *Rowlands*, 5 Id. 436; *Hilton* v. *Eckersley*, 6 E. & B. 47; *Shelburn* v. *Oliver*, 13 L. T. (N. S.), 630; *Skinner* v. *Kitch*, L. R., 2 Q. B. 392; *Reg.* v. *Bunn*, 12 Cox C. C. 316; *In re Perham*, 5 Hurl. & N. 30.

We thus see that in England the distinction is made between a mere combination to unite on terms which all will ask for their work and a conspiracy in which there is an intent to coerce or im-

poverish another; and that a statutory provision allowing the former species of combination does not include the latter spcies.

In this country the same distinction seems to be made. And while, as we have shown before, a mere combination to unite on terms which all will ask for their work is not considered unlawful in this country, yet a combination to coerce or impoverish another is criminal.

In *People* v. *Melvin*, 2 Wheeler Cr. Cas. 262, and *People* v. *Trequier*, 1 Id. 142, two early New York cases, it was held that it was criminal for the workmen to combine; and, by leaving work in a body, coerce the employer into discharging certain men. Since 1829 this subject has been regulated in New York by statute, yet it has been said in that state that such conspiracies were indictable, independently of the statute: *People* v. *Fisher*, 14 Wend. 9; *Master Stevedores' Association* v. *Walsh*, 2 Daly 1.

State v. *Donaldson*, 3 Vroom 151, was a well-considered New Jersey case. There was a statute in New Jersey making penal certain combinations injurious to trade. But, as the statute was held not to abrogate the common law, the case was considered on common-law principles. The facts alleged in the indictment were that several employees had formed a conspiracy "to control, injure, terrify and impoverish" their employers, and that they notified their employers that unless certain workmen were discharged, that the conspirators would leave work in a body; and on this being refused, they ceased work as they had threatened. It was held that such a combination was criminal, and BEASLEY, J., said: "It appears to me that it is not to be denied, that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. * * * In the natural position of things, each man acting as an individual, there would be no coereion; if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another. * * * In my opinion, this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy." See also *Carew* v. *Rutherford*, 106 Mass. 1; *Snow* v. *Wheeler*, 113 Id. 179; *Walker* v. *Cronin*, 107 Id. 555. But see *Payne* v. *Rd. Co.*, 13 B. J. Lea 507; *Bowen* v. *Matheson*, 14 Allen 499.

But a conspiracy to control the will of another by quitting work for him simultaneously is not the only way in which this object may be accomplished. In the buying and selling of commodities a combination of persons may arrange their terms of doing business or refuse to deal with another, with an intent to ruin him.

This, it will be seen, is one form of a boycott. But the boycott is the same as a strike or lockout in principle. Whether the combination to coerce or prejudice another be by refusing to deal with him or to work for him, the same rules apply. But while the principle of the law is the same, yet in practice the boycott presents the evil aspects of a strike in a more aggravated form. It seems to be peculiarly ill adapted to American institutions. A strike more frequently has something to do with the real issue in dispute. Often it may be regarded as a mere incident in striking a bargain. The workmen offer to work on certain terms. But the employer says he will not accept the offer, so the workmen say that they will wait till he does accept. Strikes generally have other elements than this; but they may be, and often are, nothing more. The boycott, however, is usually introduced as a side issue. The boycotter seldom or never has any fault to find with a salesman's goods. The direct transaction between the parties is entirely lost sight of. The boycott is applied in order to coerce him in regard to some entirely different matter. It is a peculiar species of industrial warfare, which, as generally conducted, is highly criminal, and which public opinion universally condemns. Often the boycotters have a man so in their power that they freely extort money from him, thus making the offence more atrocious. In the celebrated Theiss boycott in New York city, offensive circulars were distributed in front of the victim's place of business. Pressure was so brought to bear that the supplies necessary to carry on his business were refused. And ruin was only averted by the payment of a large sum of money. Surely, when a boycott is carried to such an extent, it must be a flagrant violation of the law.

The English case of *Mogul S. S. Co.* v. *McGregor*, 5 Q. B. Div. 476, a civil action in the Queen's Bench Division, decided in 1885, involved a peculiar species of boycotting. This was an action the parties to which were the respective owners of ships plying between England and China. The defendants in that case had conspired to ruin the plaintiff's business by allowing certain discounts to those who would deal with them exclusively. The plaintiffs had applied for an interlocutory injunction pending the trial restraining the said acts of defendants. It was held that this was not a proper case for an injunction, on the ground that the injury was not irreparable and for other reasons. COLERIDGE, C. J., however, who delivered the opinion of the court, said: "It is certainly conceivable that such a conspiracy —because conspiracy undoubtedly it is— as this might be proved in point of fact: and I do not entertain any doubt, nor does my learned brother, that, if such a conspiracy were proved in point of fact, and the intuitus of the conspirators were made out to be, not the mere honest support and maintenance of the defendant's trade, but the destruction of the plaintiff's trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy would lie."

The recent cases in this country which have been decided as to the legality of the form of strikes and boycotts now under consideration have been very decided in pronouncing them illegal.

Besides the principal case, we have the case of *State* v. *Glidden*, 3 New Eng. Rep. 849, which was decided April 1, 1887, by the Supreme Court of Connecticut—a case in which the defendants had sought to procure the discharge of certain workmen by leaving work in a body, and where they had sought to further enforce demands by a boycott— CARPENTER, J., in delivering the opinion of the Court, held these acts criminal by local statute. But he also discussed the common law of conspiracy, and found the acts of defendants equally unlawful

at common law. He said: "It seems strange in a country in which law interferes so little with the liberty of the individual, that it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own, so long as he does nothing unlawful and acts with due regard to the rights of others, and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of citizens, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little if any better than force, the action of employers. The defendants and their associates said to the Carrington Publishing Company: 'You shall discharge the men you have in your employ, and shall hereafter employ only such men as we shall name. It is true we have no interest in your business; we have no capital to invest therein; we are in no wise responsible for its success, and we do not participate in its profits, yet we have a right to control its management and compel you to submit to our direction.' The bare assertion of such a right is startling. * * * Suppose the government should assert the right in the same manner to regulate and control the business affairs of the Carrington Publishing Company, and other business enterprises, how long would the people submit to it? And yet the exercise of such a power by government would be far more tolerable than its exercise would be by secret organizations, however wise and intelligent such organizations may be,—for government is established by the people and is responsible to all the people. * * * They (the laborers) had a right to ask the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper arguments in support of their request. But they had not the right to say, 'you shall do this or we will ruin your business.' Much less had they a right to ruin its business. In such a case the direct and primary object must be regarded as the destruction of the business. The fact that it is designed as a means to an end, and that end in itself considered a lawful one, does not divest the transaction of its criminality."

Thus the courts of this country seem to be settling down to the conclusion, that a conspiracy to coerce or prejudice one in his business, even though there be no violence, is unlawful. The courts, however, are very careful in applying this rule. The purpose of the combination must be shown to be wrongful. It is, perhaps, by considering the strict application of this rule that the case of *Commonwealth* v. *Hunt*, 4 Met. 111, in Massachusetts can be distinguished from the cases already cited. In that case a number of journeymen boot-makers formed a club, one of the regulations of which was that no member should work for a manufacturer who employed any one not a member of that club. It was held that this was not *per se* unlawful. Said SHAW, C. J.: "Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this, that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman. The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or

to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association was criminal." In speaking of this case, BEASLEY, J., in *State* v. *Donaldson*, cited *supra*, held that the case was clearly distinguishable. He said: "I concur entirely as well with the principles embodied in the opinion which was read in the case as in the result which was attained. The foundation of the indictment in that case was the formation of a club by journeymen boot-makers, one of the regulations of which was, that no person belonging to it should work for any master workman who should employ any journeyman or other workman who shonld not be a member of such club. Such a combination does not appear to possess any feature of illegality, for the law will not intend, without proof, that it was formed for the accomplishment of any illegal end. * * * The force of this association was not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position to use the power, by a concert of action, which such position gives them, to compel their employer to a certain line of conduct. The object of the club was to establish a general rule for the regulation of its members; but the object of the combination, in the case now before this court, was to occasion a particular result which was mischievous, and by means which were oppressive. The two cases are not parallel, and must be governed by entirely different considerations."

Again, as illustrating the strictness with which the courts regard the rule making combinations criminal where force is not threatened, it was said in Pennsylvania, that when the laborers form a conspiracy to prejudice their employers, that it was lawful for the employers to combine to resist the conspiracy. It was held that the motive determined the illegality of the act. "A combination to resist oppression, not merely supposed but real, would be perfectly innocent —for, where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy. It is a fair employment of means not criminal in the abstract, but only so when directed to the attainment of a criminal object; and it is therefore idle to say the law affords a remedy to which the parties must recur: the legal remedy is cumulative, and does not take away the preventive remedy by the acts of the parties. It would be an assumption of the question to say it is criminal to do a lawful act by unlawful means, when the object must determine the character of the means:" GIBSON, J., in *Commonwealth* v. *Carlisle*, Bright 42.

There has been much talk of late in reference to conspiracies which have for their object the controlling of prices of the various staples in the markets. The combinations which are everywhere making their appearance to control the prices of the necessities of life are no doubt extremely prejudicial to the public. We have before shown that by the old English common law and statutes all combinations to raise prices were criminal. So, also offences of this general nature even when committed by one person, as engrossing, forestalling and regrating were criminal both by statute and by common law. 4 Bl. Com. 158. But these offences have been modified by statute in England and also in many of the American states. But where the common law of this subject has not been specifically abolished by statute "modern ideas of trade have practically abrogated

some common-law doctrines which are supposed to unduly hamper commerce." CAMPBELL, J., in *Raymond* v. *Leavitt*, 46 Mich. 447. Yet where there is a combination it would seem that there is more reason to regard the proceeding as criminal. In Pennsylvania an action was brought to recover on a contract to suspend the deliveries and sales of coal. This contract was declared void as being in restraint of trade; and AGNEW, J., held that it was criminal to enter into such a combination, although his remarks must be considered *obiter* in this case. He said: "Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. * * * But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire production. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offence. * * * Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the market, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe." *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 186. See also, *Hooker* v. *Vandewater*, 4 Denio 349; *Raymond* v. *Leavitt*, 46 Mich. 447; *People* v. *Fisher*, 14 Wend. 9. It would seem, however, that a mere combination of individuals to agree to ask a certain price for a commodity is not *per se* criminal. Such a doctrine would not be in harmony with the law in regard to labor combinations and would not suit the general spirit of our commercial institutions. But where a combination is formed, the manifest effect of which is to greatly prejudice the public; where the entire product of a great staple, as, for instance, coal, is centered in the control of a single combination, it could hardly be urged that there is not enough of the old common law in force to punish such a combination. This question is likely to become very important in the future, as there is great dissatisfaction with the doings of such combinations, and there is an inclination to make them answer for their conduct in the courts if possible.

Where the element of fraud enters in, however, the combination is generally criminal. A conspiracy to defraud is in many cases held criminal, when, if the fraud were committed by one, no criminal proceeding could be instituted: Bish. Cr. Law (7th ed.) 198, and cases there cited. And to defraud the public is regarded as even more culpable than to defraud an individual. In *Rex* v. *De Berenger*, 3 M. & S. 67 (see also *Reg.* v. *Gurney*, 11 Cox C. C. 414; *Rex* v. *Roberts*, 1 Camp. 399; *Commonwealth* v. *Supt. Philadelphia County Prison*, 6 Phila. 169; *Samp-*

son v. *Shaw*, 101 Mass. 145; *Rex* v. *Stenson*, 12 Cox C. C. 111), a leading case upon this subject, it was held that a combination to raise the price of the public funds by circulating false rumors was criminal. The corners which are conducted on 'change are often in fraud of the public, and are a very heinous form of criminal conspiracies. Again, the conspiracies which are often resorted to, to depress the value of stocks possess the most revolting degree of culpability. For instance, a number of persons who have been elected directors of a railroad company enter deliberately into a conspirracy to betray the trust reposed in them. The road is to be saddled with debts, its credit ruined and the innocent purchaser of the stock forced to part with it at a great loss. Such combinations are unquestionably criminal conspiracies.

Concluding Considerations.—It is often said that the law is made for the rich man, and that it has little regard for the poor man. This has been said especially of late in regard to the law of conspiracy. It may be that the law is more often enforced against the poor man. But as regards the law itself, an examination of the authorities negatives this idea. It is only when the workingman seeks to interfere with the rights of others that the strong arm of the law is called upon to intervene. And, strange as it may seem, the cases in which the combinations of workmen become unlawful are very often where they seek to procure the discharge of fellow-workmen. Yet such an attack is as much an attack upon labor as it is upon capital. Every workman should have a right to adopt such means us he may deem best to better his condition. Often the measures adopted by labor unions are of more injury to the laborer than they are to the employer. No labor union has a right to coerce a laborer to join it by threats of depriving him of his means of making a livelihood and reducing him to beggary. It is a form of despotism which can never be tolerated. Nor would the honest business man be at all prejudiced by the enforcement of the law which prohibits corrupt conspiracies for controlling markets. A free market, where any man may buy or sell in good faith, is of great importance to the business community; and the Stock Exchange and the Board of Trade, so far as they supply a free market, are among the most valuable of our business institutions. But, notwithstanding the enormous benefits of these institutions, we find that among the people they are looked upon with distrust. It is because, among other reasons, of the criminal conspiracies which are known to be entered into within their walls. It would be better for the public —better also for reputable brokers in Wall street—if the law in regard to this form of conspiracies were more often enforced. As a whole, the law of conspiracy presents a just and equitable department of our jurisprudence. Each citizen is alike protected in his rights. Each is made subject to the legal restraint when he fails to show due regard for the rights of others. Still it should be remembered that the decisions upon which the law is grounded are some of them old English cases which are meagerly reported, that much of the authority ordinarily cited consists of dicta and *nisi prius* decisions, and that there are many decisions of courts of last resort which it is difficult to harmonize with the weight of authority. Then, the law upon this subject appears to many to be contrary to some of the general maxims which have been accepted as a guide in our policy. The people of this country are very jealous when their freedom of combination is even seemingly interfered with, and they may not always see the justice of decisions which are founded upon authority which is the least doubtful. Our legislature, then, should enact delaratory statutes, declaring as accurately as may be just, what combinations are legal and what illegal. And this

formal legislative declaration, broadly interpreted by our courts, with due regard to our peculiar institutions, would set at rest much controversy as to the legal right of capital and labor.

HARRISON H. BRACE.

Supreme Court of the United States.

EX PARTE BAIN, JR.

The declaration of Article V. of the Amendments to the Constitution, that "no person shall be held to answer for a capital, or otherwise, infamous, crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by the grand jury, duly impanelled, of a charge describing an offence against the law for which the party charged may be punished.

When this indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the constitution above recited, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with the consent of the court, to conform to their views of the necessities of the case.

Upon an indictment so changed the court can proceed no further. There is nothing in the language of the constitution, which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary for such trial, is entitled to his discharge by writ of *habeas corpus*.

ON Petition for a writ of *habeas corpus*.

The opinion of the court was delivered by

MILLER, J.—This is an application to this court for a writ of *habeas corpus* to relieve the petitioner, George M. Bain, Jr., from the custody of Thomas W. Scott, United States Marshal for the Eastern District of Virginia. The original petition set out with particularity proceedings in the Circuit Court of the United States for that district, in which the petitioner was convicted under Section 5209 of the Revised Statutes, of having made a false report or statement as cashier of the Exchange National Bank of Nor-